

# **WEST VIRGINIA LEGISLATURE**

## **2020 REGULAR SESSION**

**Introduced**

### **Senate Bill 810**

BY SENATOR SMITH

[Introduced February 17, 2020; referred  
to the Committee on Energy, Industry, and Mining;  
and then to the Committee on the Judiciary]

1 A BILL to amend and reenact §22-5-20 of the Code of West Virginia, 1931, as amended, relating  
 2 to adoption of a state plan implementing the federal Affordable Clean Energy rule pursuant  
 3 to section 111(d) of the federal Clean Air Act.

*Be it enacted by the Legislature of West Virginia:*

**ARTICLE 5. AIR POLLUTION CONTROL.**

**§22-5-20. Development of a state plan relating to carbon dioxide emissions from existing fossil fuel-fired electric generating units.**

1 The West Virginia Department of Environmental Protection shall submit to the 2021  
 2 Regular Session of the West Virginia Legislature its proposed rules implementing the “Affordable  
 3 Clean Energy” rule (“ACE”), consisting of Emission Guidelines for Greenhouse Gas (GHG)  
 4 Emissions from Existing Electric Utility Generating Units (EGUs) pursuant to the federal Clean Air  
 5 Act section 111(d).

6 ~~(a) Legislative findings.—~~

7 ~~(1) The United States Environmental Protection Agency has proposed a federal rule~~  
 8 ~~pursuant to Section 111(d) of the Clean Air Act, 42 U. S. C. §7411(d), to regulate carbon dioxide~~  
 9 ~~emissions from electric generating units.~~

10 ~~(2) The rule is expected to go into effect on or about June 30, 2015, and will require each~~  
 11 ~~state to submit a state plan pursuant to Section 111(d) that sets forth laws, policies and regulations~~  
 12 ~~that will be enacted by the state to meet the federal guidelines in the rule.~~

13 ~~(3) The creation of this state plan necessitates establishment and creation of law affecting~~  
 14 ~~the economy and energy policy of this state.~~

15 ~~(4) The Environmental Protection Agency has stated that any state plan it ultimately~~  
 16 ~~approves shall become enforceable federal law upon that state.~~

17 ~~(5) The state disputes the jurisdiction and purported binding nature asserted by the~~  
 18 ~~Environmental Protection Agency through this rule, and reserves to itself those rights and~~  
 19 ~~responsibilities properly reserved to the State of West Virginia.~~

20 ~~(6) Given the economic impact and potentially legally binding nature of the submission of~~  
21 ~~a state plan, there is a compelling state interest to require appropriate legislative review and~~  
22 ~~passage of law prior to submission, if any, of a state plan pursuant to Section 111(d) of the Clean~~  
23 ~~Air Act.~~

24 ~~(b) Submission of a state plan.— Absent specific legislative enactment granting such~~  
25 ~~powers or rule-making authority, the Department of Environmental Protection or any other agency~~  
26 ~~or officer of state government is not authorized to submit to the Environmental Protection Agency~~  
27 ~~a state plan under this section, or otherwise pursuant to Section 111(d) of the Clean Air Act:~~  
28 ~~Provided, That the Department of Environmental Protection, in consultation with the Department~~  
29 ~~of Environmental Protection Advisory Council and other necessary and appropriate agencies and~~  
30 ~~entities, may develop a proposed state plan in accordance with this section.~~

31 ~~(c) Development of a Proposed State Plan.— (1) The Department of Environmental~~  
32 ~~Protection shall, no later than one hundred eighty days after a rule is finalized by the~~  
33 ~~Environmental Protection Agency that requires the state to submit a state plan under Section~~  
34 ~~111(d) of the Clean Air Act, 42 U. S. C. § 7411(d), submit to the Legislature a report regarding~~  
35 ~~the feasibility of the state's compliance with the Section 111(d) rule. The report must include a~~  
36 ~~comprehensive analysis of the effect of the Section 111(d) rule on the state, including, but not~~  
37 ~~limited to, the need for legislative or other changes to state law, and the factors referenced in~~  
38 ~~subsection (g) of this section. The report must make at least two feasibility determinations: (i)~~  
39 ~~Whether the creation of a state plan is feasible based on the comprehensive analysis; and (ii)~~  
40 ~~whether the creation of a state plan is feasible before the deadline to submit a state plan to~~  
41 ~~Environmental Protection Agency under the Section 111(d) rule, assuming no extensions of time~~  
42 ~~are granted by Environmental Protection Agency. If the department determines that a state plan~~  
43 ~~is or is not feasible under clause (i) of this subsection, the report must explain why. If the~~  
44 ~~department determines that a state plan is not feasible under clause (ii) of this subsection, it shall~~  
45 ~~explain how long it requires to create a state plan and then endeavor to submit such a state plan~~

46 to the Legislature as soon as practicable. Such state plan may be on a unit-specific performance  
47 basis and may be based upon either a rate-based model or a mass-based model.

48 (2) If the department determines that the creation of a state plan is feasible, it shall develop  
49 and submit the proposed state plan to the Legislature sitting in regular session, or in an  
50 extraordinary session convened for the purpose of consideration of the state plan, in sufficient  
51 time to allow for the consideration of the state plan prior to the deadline for submission to the  
52 Environmental Protection Agency.

53 (3) In addition to submitting the proposed state plan to the Legislature, the department  
54 shall publish the report and any proposed state plan on its website.

55 (d) If the department proposes a state plan to the Legislature in accordance with  
56 subsection (c) of this section, the department shall propose separate standards of performance  
57 for carbon dioxide emissions from existing coal-fired electric generating units in accordance with  
58 subsection (e) of this section and from existing natural gas-fired electric generating units in  
59 accordance with subsection (f) of this section. The standards of performance developed and  
60 proposed under any state plan to comply with Section 111 of the Clean Air Act should allow for  
61 greater flexibility and take into consideration the additional factors set forth in subsection (g) of  
62 this section as a part of any state plan to achieve targeted reductions in greenhouse gas  
63 emissions which are equivalent or comparable to the goals and marks established by federal  
64 guidelines.

65 (e) *Standards of performance for existing coal-fired electric generating units.* — Except as  
66 provided under subsection (g) of this section, the standard of performance proposed for existing  
67 coal-fired electric generating units under subsection (c) of this section may be based upon:

68 (1) The best system of emission reduction which, taking into account the cost of achieving  
69 the reduction and any nonair quality health and environmental impact and energy requirements,  
70 has been adequately demonstrated for coal-fired electric generating units that are subject to the  
71 standard of performance;

72 ~~(2) Reductions in emissions of carbon dioxide that can reasonably be achieved through~~  
73 ~~measures undertaken at each coal-fired electric generating unit; and~~

74 ~~(3) Efficiency and other measures that can be undertaken at each coal-fired electric~~  
75 ~~generating unit to reduce carbon dioxide emissions from the unit without switching from coal to~~  
76 ~~other fuels or limiting the economic utilization of the unit.~~

77 ~~(f) Standards of performance for existing natural gas-fired electric generating units. —~~  
78 ~~Except as provided in subsection (g) of this section, the standard of performance proposed for~~  
79 ~~existing gas-fired electric generating units under subsection (c) of this section may be based upon:~~

80 ~~(1) The best system of emission reduction which, taking into account the cost of achieving~~  
81 ~~the reduction and any nonair quality health and environmental impact and energy requirements,~~  
82 ~~has been adequately demonstrated for natural gas-fired electric generating units that are subject~~  
83 ~~to the standard of performance;~~

84 ~~(2) Reductions in emissions of carbon dioxide that can reasonably be achieved through~~  
85 ~~measures at each natural gas-fired electric generating unit; and~~

86 ~~(3) Efficiency and other measures that can be undertaken at the unit to reduce carbon~~  
87 ~~dioxide emissions from the unit without switching from natural gas to other lower carbon fuels or~~  
88 ~~limiting the economic utilization of the unit.~~

89 ~~(g) Flexibility in establishing standards of performance. — In developing a flexible state~~  
90 ~~plan to achieve targeted reductions in greenhouse gas emissions, the department shall endeavor~~  
91 ~~to establish an achievable standard of performance for any existing fossil fuel-fired electric~~  
92 ~~generating unit, and examine whether less stringent performance standards or longer compliance~~  
93 ~~schedules may be implemented or adopted for existing fossil fuel-fired electric generating units in~~  
94 ~~comparison to the performance standards established for new, modified or reconstructed~~  
95 ~~generating units, based on the following:~~

96 ~~(1) Consumer impacts, including any disproportionate impacts of energy price increases~~  
97 ~~on lower income populations;~~

- 98 ~~(2) Nonair quality health and environmental impacts;~~
- 99 ~~(3) Projected energy requirements;~~
- 100 ~~(4) Market-based considerations in achieving performance standards;~~
- 101 ~~(5) The costs of achieving emission reductions due to factors such as plant age, location~~
- 102 ~~or basic process design;~~
- 103 ~~(6) Physical difficulties with or any apparent inability to feasibly implement certain emission~~
- 104 ~~reduction measures;~~
- 105 ~~(7) The absolute cost of applying the performance standard to the unit;~~
- 106 ~~(8) The expected remaining useful life of the unit;~~
- 107 ~~(9) The impacts of closing the unit, including economic consequences such as expected~~
- 108 ~~job losses at the unit and throughout the state in fossil fuel production areas including areas of~~
- 109 ~~coal production and natural gas production and the associated losses to the economy of those~~
- 110 ~~areas and the state, if the unit is unable to comply with the performance standard;~~
- 111 ~~(10) Impacts on the reliability of the system; and~~
- 112 ~~(11) Any other factors specific to the unit that make application of a modified or less~~
- 113 ~~stringent standard or a longer compliance schedule more reasonable.~~
- 114 ~~(h) *Legislative consideration of proposed state plan under Section 111(d) of the Clean Air*~~
- 115 ~~*Act.* — (1) If the department submits a proposed state plan to the Legislature under this section,~~
- 116 ~~the Legislature may by act, including presentment to the Governor: (i) Authorize the department~~
- 117 ~~to submit the proposed state plan to the Environmental Protection Agency; (ii) authorize the~~
- 118 ~~department to submit the state plan with amendment; or (iii) not grant such rulemaking or other~~
- 119 ~~authority to the department for submission and implementation of the state plan.~~
- 120 ~~(2) If the Legislature fails to enact or approve all or part of the proposed state plan, the~~
- 121 ~~department may propose a new or modified state plan to the Legislature in accordance with the~~
- 122 ~~requirements of this section.~~
- 123 ~~(3) If the Environmental Protection Agency does not approve the state plan, in whole or in~~

124 ~~part, the department shall as soon as practicable propose a modified state plan to the Legislature~~  
125 ~~in accordance with the requirements of this section.~~

126 ~~(i) *Legal effect.* — Any obligation created by this section and any state plan submitted to~~  
127 ~~the Environmental Protection Act pursuant to this section shall have no legal effect if:~~

128 ~~(1) The Environmental Protection Agency fails to issue, or withdraws, its federal rules or~~  
129 ~~guidelines for reducing carbon dioxide emissions from existing fossil fuel-fired electrical~~  
130 ~~generating units under 42 U. S. C. §7411(d); or,~~

131 ~~(2) A court of competent jurisdiction invalidates the Environmental Protection Agency's~~  
132 ~~federal rules or guidelines issued to regulate emissions of carbon dioxide from existing fossil fuel-~~  
133 ~~fired electrical generating units under 42 U. S. C. §7411(d).~~

134 ~~(j) *Effective date.* — All provisions of this section are effective immediately upon passage~~

NOTE: The purpose of this bill is to remove limitations placed upon the Department of Environmental Protection with regard to the Obama Administration's Clean Power Project (CPP) and to ensure proper development and approval of the Trump Administration's Affordable Clean Energy (ACE) rule. The DEP will not be able to comply with EPA ACE requirements without repeal of this article.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.